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Sentence

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
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3 UNITED STATES OF AMERICA,

4 v.

13 Cr. 324 (VB)
Sentence

5 JOSEPH McCRIMON,

6 Defendant.

7 -----x

8 May 14, 2014
9 2:35 p.m.
White Plains, N.Y.

10 Before:

11 THE HONORABLE VINCENT L. BRICCETTI,

12 District Judge

13 APPEARANCES

14 PREET BHARARA

15 United States Attorney for the
Southern District of New York

16 JAMES F. McMAHON

Assistant United States Attorney

17 ANDREW A. RUBIN

18 Attorney for Defendant

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MARY M. STATEN, CSR, RPR, RMR
(914) 390-4027

1
2 THE DEPUTY CLERK: United States of America against
3 Joseph McCrimon.

4 Will counsel please note their appearance for the
5 record.

6 MR. McMAHON: Yes.

7 Good afternoon, your Honor.

8 Jay McMahon, Assistant U.S. Attorney, for the United
9 States.

10 MR. RUBIN: Good afternoon, your Honor.

11 Andrew Rubin for Joseph McCrimon.

12 THE COURT: Good afternoon, everybody.

13 Have a seat.

14 All right. This matter is on for sentencing today,
15 the defendant having pleaded guilty to one count of bank
16 robbery. That's Count Two of Indictment 13 Criminal 324.

17 I've reviewed the following materials in preparation
18 for sentencing: Presentence report dated April 10th, 2014,
19 prepared by Probation Officer Katrina Minus-Shepard. Plea
20 agreement dated April -- excuse me -- May 8th, 2013.

21 Sentencing letter submitted by Mr. Rubin dated May 9th, 2014.
22 And attached to that letter were a number of materials,
23 including a psychiatric evaluation dated January 12th, 2014,
24 prepared by Dr. Allen Goldstein. There are also letters dated
25 September 8th, 2013, from Quanda Moore, July 29th, 2013, from

1 Rasheeda Barzey, B-A-R-Z-E-Y. There is an undated letter
2 from -- I think it's Hasley DeRosina.

3 Let me just check that.

4 MR. RUBIN: That's correct, Judge.

5 THE COURT: Okay. I've also received two letters from
6 the government, one dated April 14th, 2014, and the second one
7 dated May 12th, 2014. I've reviewed all those materials. I
8 also previously received letters from Ms. Barzey, which I think
9 is identical to the one that's attached to Mr. Rubin's
10 submission. Although attached to that previous letter, which I
11 received back in August of last year, there are materials
12 attached. In other words, Ms. Barzey's letter has attached
13 documents.

14 The attachments are not part of the attachments to
15 your letter, Mr. Rubin.

16 MR. RUBIN: Judge, I think I'm familiar with what
17 those documents are.

18 THE COURT: I'm going to show it to you, just to make
19 sure you have it. But the main part of the letter is the same.
20 It's the attachments that are different, which are basically
21 Social Security related.

22 MR. RUBIN: Documents.

23 THE COURT: Documents, yes.

24 And then, also, I had previously received a letter
25 from Ms. DeRosina. I also had previously received a letter

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1 from Lillie Mae Louise Wheeler.

2 MR. RUBIN: That one, I don't believe I have, Judge.

3 THE COURT: All right. Well, you can look at it. I'm
4 going to give it to you right now.

5 And then, again, another copy of the letter from
6 Quanda Moore.

7 There is a lot of highly personal information
8 regarding Mr. McCrimon, and also information regarding his
9 emotional issues in here. So my intention is to docket all
10 these letters under seal.

11 MR. RUBIN: Thank you, Judge.

12 THE COURT: I want to make these part of the record,
13 but do it under seal, unless you have an objection to that.

14 MR. RUBIN: I don't, your Honor.

15 THE COURT: And the same thing with your letter of
16 May 9th. I don't think you filed it on ECF.

17 MR. McMAHON: I didn't file it on ECF for that very
18 reason, your Honor.

19 THE COURT: All right. Well, I'll file it, but I'll
20 file it under seal.

21 Let me just have both lawyers look at these. I think
22 most of what's in there, you've seen before. Just let me make
23 sure there is nothing in there that you haven't seen before, or
24 if there is, that you've had an opportunity to review it.

25 (Pause)

1 THE COURT: And just so we're clear, I think those
2 letters that I'm showing you now came to me directly. They did
3 not come from Mr. Rubin or Mr. Rubin's predecessor on the case.
4 They came just directly from those people.

5 MR. RUBIN: The only thing I haven't seen, Judge, I
6 believe, is Ms. Wheeler's. If I could just have an opportunity
7 to read that.

8 THE COURT: Of course. Absolutely.

9 (Pause)

10 MR. RUBIN: Thank you, Judge.

11 I think I'm going to ask that this be considered as
12 part of my -- that this one letter be added to my sentencing
13 submission.

14 THE COURT: Well, I mean, effectively, it is, because
15 I'm considering everything. Everything I've just said on the
16 record I've reviewed and is being considered by me in
17 connection with sentencing.

18 So you're going to give that package back to my Clerk,
19 and I'll have all of it docketed under seal.

20 MR. RUBIN: Thank you, your Honor.

21 THE COURT: We'll put it in one envelope.

22 All right. And you've reviewed this, as well,
23 Mr. McMahon?

24 MR. McMAHON: I have, your Honor.

25 THE COURT: Okay. Has anything else been submitted

1 that I failed to mention?

2 Mr. McMahon?

3 MR. McMAHON: Not from the government.

4 THE COURT: Mr. Rubin?

5 MR. RUBIN: Not to my knowledge.

6 THE COURT: Okay. Mr. Rubin, have you read the
7 presentence report and discussed it with your client?

8 MR. RUBIN: I have, your Honor.

9 THE COURT: And, Mr. McCrimon, have you read the
10 presentence report, or has someone helped you review the
11 presentence report?

12 THE DEFENDANT: Yes.

13 THE COURT: And have you discussed it with your
14 attorney; Mr. Rubin?

15 THE DEFENDANT: Yes.

16 THE COURT: Okay. And, Mr. McMahon, have you read the
17 presentence report?

18 MR. McMAHON: I have, your Honor.

19 THE COURT: All right. Just have a seat for a moment,
20 Mr. Rubin. I just want to sort of summarize what's in the
21 report for the record.

22 This is the calculation of the sentencing guidelines
23 range as set forth in the presentence report. It starts with a
24 base offense level of 20 under Guidelines Section 2B3.1. Two
25 levels are added because the property of a financial

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1 institution was taken. That's 2B3.1(b)(1). Three levels are
2 added because the defendant created the impression that he
3 possessed an explosive device. The reference for that is
4 2B3.1(b)(2)(E), and Application Note 2 to that section. An
5 additional point is added because the loss exceeded \$10,000.
6 Two additional levels are added because the defendant --
7 basically, for obstruction of justice, but specifically because
8 the defendant recklessly created a substantial risk of death or
9 serious bodily injury to others in the course of fleeing from
10 the scene of the crime. That's under 3C1.2, and the relevant
11 conduct rules of 1B1.3(a)(1)(B). There is a three-level
12 downward adjustment for acceptance of responsibility. The
13 report says that the defendant has three criminal history
14 points for a conviction in 1995, which yields a Criminal
15 History Category of II.

16 So the sentencing range, according to the PSR, at
17 Level 25, Criminal History Category II, is 63 to 78 months'
18 imprisonment. The supervised release range is one to three
19 years. The fine range is \$10,000 to a thousand dollars.

20 What I've done is just summarize what's in the report.

21 Now, I know there are a number of issues that I need
22 to resolve.

23 Number one, the -- well, the first issue is the loss
24 issue. And my understanding is that there was some suggestion
25 of the defendant challenging the one-level upward adjustment

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1 for loss of \$15,000, because that loss is based on the \$10,000
2 loss associated with the Ardsley bank robbery, which is the
3 bank robbery to which the defendant pleaded guilty. And then,
4 in Paragraphs 15 and 16 of the PSR, there is a reference to a
5 separate robbery of the Hudson Valley Bank, in Mount Vernon,
6 which I think occurred a couple of weeks prior to the Ardsley
7 robbery. And again, the Ardsley robbery is the robbery to
8 which Mr. McCrimon pleaded guilty. And in the plea agreement,
9 it says that the loss is \$15,000, referencing those two
10 robberies. But, of course, the defendant has not been
11 convicted of the -- or even charged, for that matter, with the
12 Mount Vernon robbery.

13 Now, again, so we're clear on this, I got a letter
14 from the government dated --

15 Your most recent letter is here somewhere. Just give
16 me one second.

17 (Pause)

18 THE COURT: Here it is, your May 12th, letter,
19 Mr. McMahon, where you discuss the circumstances or the
20 government's assertions, anyway, regarding this Mount Vernon
21 robbery. But then you say that "The parties have agreed that
22 we do not need a Fatico hearing regarding the one-point
23 enhancement for the Mount Vernon robbery. Accordingly, the
24 government will rest on the facts and argument in its
25 April 16th memorandum" -- and that was actually before your

1 previous memorandum -- "and this letter, and will not be
2 presenting any testimony at tomorrow's sentencing."

3 In addition, in Mr. Rubin's submission of May 9th, he
4 said, "We are not herein challenging the one-point increase for
5 the loss amount," and then goes on to say that "If the Court is
6 going to give any consideration to the government's assertion,"
7 meaning the robbery -- the assertion that Mr. McCrimon was
8 involved in the Mount Vernon robbery," the letter goes on to
9 say, quote, "I am" -- meaning Mr. Rubin -- "I am requesting the
10 opportunity to respond, as I do not believe that any credible
11 evidence supports the conclusion that the defendant
12 participated in that robbery."

13 So let me deal with that issue first.

14 Well, you know what? Let me list the other two issues
15 and ask you if there are any other objections beyond these
16 three things or any other issues beyond these three things.

17 The other issue is the plus three levels for use of a
18 dangerous weapon -- that's referred to in the report at
19 Paragraph 26 -- and the plus two levels for obstruction, based
20 on the flight after the bank robbery. That's referenced in
21 Paragraph 30.

22 Those are the three issues that I think I need to
23 resolve one way or another.

24 Other than those issues, are there any other factual
25 or other objections of any kind that the defendant has to the

1 PSR?

2 MR. RUBIN: No, your Honor.

3 THE COURT: Okay. And what about the government? Are
4 there any other disputes or objections you have to the PSR,
5 either factually or legally?

6 MR. McMAHON: No, your Honor.

7 THE COURT: Other than the three we just talked about.

8 MR. McMAHON: Other than these three.

9 THE COURT: Okay. All right. Well, then, other than
10 the factual recitation regarding loss, dangerous weapon and
11 obstruction, there is no dispute as to the facts, and so the
12 Court adopts the factual statements in the presentence report
13 as the Court's own findings of fact for purposes of sentencing,
14 with the exception of those three matters.

15 MR. RUBIN: Judge --

16 THE COURT: But I am going to make some additional
17 rulings regarding those three matters.

18 Go ahead.

19 MR. RUBIN: Judge, I apologize.

20 My client brought to my attention, and I don't -- it
21 doesn't affect his criminal history. However, there is a
22 statement in the presentence report in the criminal history --

23 THE COURT: Give me a page or a paragraph.

24 MR. RUBIN: I'm about to look for it, Judge. I
25 apologize.

1 THE COURT: The criminal history is on Page 9, if that
2 helps.

3 MR. RUBIN: I see that. It may be -- let me see. It
4 refers to another -- there is some place -- and I apologize I
5 don't have it handy -- where they refer to a subsequent -- I
6 don't think they call it an "arrest," but a subsequent
7 allegation that he was involved in some type of criminal
8 behavior, but there was no -- there is nothing on his record
9 regarding that. So he didn't receive any points for it. I'm
10 just trying to locate it.

11 THE COURT: I think I know what you're referring to.
12 Paragraph 41.

13 MR. RUBIN: Okay.

14 THE COURT: You're talking about -- it, not you. The
15 PSR talks about adjustment to parole supervision following the
16 1995 conviction?

17 MR. RUBIN: Right.

18 THE COURT: And it says, "On November 23rd, 2002,
19 Mr. McCrimon was arrested for criminal mischief and assault."

20 Is that what you're talking about?

21 MR. RUBIN: It is, Judge.

22 THE COURT: There is no reference to that arrest in
23 the presentence report.

24 MR. RUBIN: There isn't. And I'm told that there was
25 some altercation -- it didn't result in an arrest -- between my

1 client and the mother of one of his children. That's what
2 they're probably referring to, but there was never any type of
3 arrest or any type of adjudication regarding that.

4 THE COURT: Well, I'm sure there was no adjudication,
5 but the narrower question is: Was there an arrest? And that
6 would be reflected in his rap sheet.

7 I mean, you have his rap sheet, Mr. McMahon. Or both
8 of you do, I assume. I'm prepared to ignore it.

9 Go ahead.

10 MR. RUBIN: If you are going to ignore any reference
11 to that, then I have no other objection.

12 THE COURT: I mean, your impression is that he was
13 never arrested.

14 MR. RUBIN: No, I'm sorry, Judge. Actually, I
15 misspoke. He was arrested. Apparently, he was arrested, but
16 the charges were thrown out or dismissed.

17 THE COURT: Okay. Well, there is certainly nothing in
18 the PSR that says that he was convicted of anything with
19 respect to that incident; the '02 incident, that is. So as far
20 as I'm concerned, it plays absolutely no role whatsoever.

21 MR. RUBIN: Then I have nothing else.

22 MR. McMAHON: Well, the only thing I would point out,
23 Judge, is that the incident, not the arrest, but the incident
24 is relevant, because it led to his parole being revoked, and he
25 was held to the end of his parole.

1 THE COURT: That's incorporated into the Criminal
2 History Category, as far as I'm concerned. The Criminal
3 History Category reflects three points. The reason it reflects
4 the three points, I think, is because, even though the
5 conviction was 18 years prior to the bank robbery in this case,
6 he was in custody within ten years of the bank robbery. So
7 therefore, that counts, I think.

8 MR. McMAHON: Right.

9 THE COURT: The point is, the fact that he was in
10 custody for a parole violation is accounted for in his Criminal
11 History Category already. So we don't have to get into an
12 underlying arrest or underlying conduct that led to a parole
13 violation. So that's neither here nor there. The point is, he
14 gets three criminal history points, and therefore, he's
15 Category II. And we agree on that. Right?

16 MR. RUBIN: Yes, Judge.

17 MR. McMAHON: Yes, your Honor.

18 THE COURT: All right. So I'm not going to
19 consider -- and, in fact, until you just mentioned it,
20 Mr. Rubin, I read it, but I had forgotten it was in here, and
21 it plays no role in my decision here.

22 Let me deal with these issues.

23 First of all, as to the "dangerous weapon"
24 enhancement, which is the two-level upward adjustment under
25 2B3.1(b) (2) (1) -- (b) (2) (E) .

1 I'm sorry, Mary. It's 2B3.1(b) (2) (E) .

2 The Court finds that that enhancement does apply in
3 this case. Specifically, the defendant used an object, his
4 camera bag, and also the note that he used when he went into
5 the bank, in a manner that created the impression that the
6 object, meaning the camera bag, was an instrument capable of
7 inflicting death or serious bodily injury.

8 It's clear under the guidelines that the object does
9 not have to, in fact, be a dangerous weapon. It just has to be
10 used in a manner that creates an impression that it is an
11 instrument capable of inflicting death or serious bodily
12 injury. So in this case -- and there is no dispute about these
13 facts. In this case, the defendant was wearing a bag around
14 his neck that resembled a camera bag. And he handed the teller
15 a note that said, quote, "You got 15 seconds to give me 20,000
16 or this device is going off."

17 As explained in Application Note 2 to this section of
18 the guidelines, 2B3.1, such an object shall be considered a
19 dangerous weapon for purposes of Subsection (b) (2) (E) of 2B3.1
20 because it clearly is an object that -- when I say "object,"
21 it's a combination of the note and the bag -- created the
22 impression that he was carrying something that was capable of
23 inflicting death or serious bodily injury, even though he
24 wasn't carrying any such thing. But that's not the point. The
25 point is that he created the impression that he was.

1 And obviously, the reason for that enhancement is that
2 the mere creating of the impression gives rise to a danger. It
3 would be even more dangerous if he was actually carrying an
4 explosive device. That would be even more dangerous. But if
5 you're giving the impression, creating the impression, that
6 you're carrying an explosive device, there is a real danger
7 associated with that, as well, because you could have
8 intervention by a guard or by a police officer or by a
9 bystander. You could have some kind of physical altercation.
10 You could have gunshots fired. There's all sorts of horribles
11 that could ensue from that. It didn't happen here, but that's
12 not the point of the guideline. The guideline is designed to
13 punish someone more severely who creates the impression that he
14 is carrying an instrument capable of inflicting death or
15 serious bodily injury.

16 So that I think that that enhancement clearly applies.
17 I really don't think it's a close case on that one.

18 The second question is whether the two-level
19 enhancement under Section 3C1.2 applies, namely, creating a
20 substantial risk of death or serious bodily injury to another
21 person in the course of fleeing from a law enforcement officer.
22 And that is contained, as I said earlier, the "obstruction of
23 justice" enhancement, in 3C1. -- I apologize. It's not the
24 "obstruction of justice" enhancement. It's the "reckless
25 endangerment during flight" enhancement, which is 3C1.2. And

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1 in that case -- the reason why the defendant is opposing that
2 is because he was not driving the car that was driven by his
3 co-defendant, Mr. Sherrod, at high rates of speed through the
4 streets of lower Westchester in the middle of the day.

5 Again, I don't think this is in dispute at all.

6 Factually, what happened here is that after Mr. McCrimon came
7 out of the bank and got into the get-away car being driven by
8 the co-defendant, the car drove away from the scene. An
9 Ardsley police officer pulled the car over because he saw
10 someone inside the car changing his clothes, and he thought
11 that was odd. The car did pull over, at least hesitate, but
12 very shortly after that, the car took off at a high rate of
13 speed, and a chase ensued. The police officer chased the car.
14 The car drove through the busy streets in the middle of day, at
15 speeds up to a hundred miles an hour. It hit at least one
16 other car. At one point, it drove in the opposite lane of
17 traffic. Eventually, it crashed in Hastings, and the car was
18 damaged.

19 There was a passenger in the car, other than the
20 defendant and his co-defendant. She was endangered by this
21 behavior, greatly endangered by this behavior, as were other
22 drivers, pedestrians and the Ardsley police officer who pulled
23 the car over in the first place. All of those people were put
24 at serious risk of -- or put at risk of serious physical injury,
25 and that seems obvious.

1 The not-so-obvious question is whether Mr. McCrimon
2 should be held accountable for this reckless flight from the
3 police, even if he didn't drive the car himself or even if he
4 didn't aid and abet, share in its reckless driving.

5 I know the government said a lot about what Sherrod
6 says that McCrimon said and McCrimon said to Sherrod while they
7 were in the car. And I kind of agree with Mr. Rubin, at least
8 to this extent, that it's an usual circumstance where the
9 government is saying that someone is credible because he
10 changed his story four times. That's one I haven't heard
11 before.

12 But as a legal matter under the guidelines, number
13 one, the effort to flee the police was clearly in furtherance
14 of criminal activity. In other words, flight from the robbery
15 itself to avoid arrest is in furtherance of the underlying
16 criminal activity. So that certainly applies here.

17 And then the question is: Was it reasonably
18 foreseeable to Mr. McCrimon that this would happen? And my
19 conclusion, my finding, is that it is -- that it was reasonably
20 foreseeable to Mr. McCrimon that this would happen, simply
21 because flight from a bank robbery in a get-away car being
22 driven by a co-conspirator might well involve reckless driving
23 that would endanger others.

24 So it's not just the fact that there is going to be an
25 effort to flee, but it's reasonably foreseeable that in the

1 course of that effort to flee in a get-away car that the car
2 might be driven at a high rate of speed, that police might try
3 to pull the car over, that police might chase the car, that in
4 the course of driving at a high right of speed in order to flee
5 or evade arrest that other people would be endangered,
6 especially in a populated area such as Ardsley and Hastings,
7 New York, and especially since there was another person in the
8 car. It's not like Mr. McCrimon was the only other passenger.
9 There was a second passenger.

10 So A, fleeing from the police was clearly in
11 furtherance of the underlying criminal activity, and B, it was
12 reasonably foreseeable to Mr. McCrimon that this would happen,
13 because flight from a bank robbery in a get-away car driven by
14 a co-conspirator might well, and is therefore reasonably
15 foreseeable to, involve reckless driving that would endanger
16 others, especially in this area, especially when there was a
17 third person in the car. And this is true, even if I disregard
18 what Sherrod told the police in a postarrest statement, or the
19 various -- some of the inconsistent things that Sherrod told
20 the police in his postarrest statement.

21 Sherrod allegedly told McCrimon that -- told the
22 police that McCrimon told Sherrod not to stop. And after
23 Sherrod took off with the cops in pursuit, McCrimon said -- or
24 kept telling Sherrod to go. That's according to Sherrod, now.
25 There has been no -- Sherrod hadn't testified. I don't have an

1 affidavit from him.

2 You know, there is some corroboration, I guess, for
3 Sherrod's postarrest statement, because part of his postarrest
4 statement was that he stopped his car, and then sped off. And
5 the police officer also said that the car stopped and then sped
6 off. So in that limited respect, there is some corroboration.
7 But there is really no corroboration for the rest of it,
8 namely, that McCrimon told him not to stop, or after Sherrod
9 was driving with the police in pursuit, that McCrimon kept
10 telling Sherrod to go.

11 But I don't think those things are necessary to my
12 finding. In other words, even if Mr. McCrimon did not aid and
13 abet -- I think that's what Mr. Rubin is arguing in his
14 letter -- in other words, even he didn't press on the gas or
15 even if he didn't tell Sherrod how fast to go or even if he
16 told Sherrod to stop -- if he had said to Sherrod, "Look.
17 You're endangering the passenger. You're endangering me.
18 You're endangering other people. You're endangering the
19 police," you know, I don't think any of that matters. The
20 bottom line is, the flight itself was in furtherance of the
21 crime, meaning the bank robbery.

22 And secondly, it was reasonably foreseeable to this
23 defendant that this flight at an excessive rate of speed
24 involving reckless driving would occur, because it involves
25 trying to avoid arrest. And sometimes when people do that,

1 they do things that they might not otherwise do. They might
2 not drive a hundred miles an hour on the wrong side of the
3 street, but for the fact that they don't want to go to jail.
4 And Mr. McCrimon had been in the bank robbery. It would be
5 different if he wasn't involved in the bank robbery, but he
6 was, and he knew that Sherrod was driving.

7 And for all those reasons, it seems to me, it was
8 entirely reasonably foreseeable that what did happen would
9 happen. And therefore, Mr. McCrimon is accountable for the
10 two-level upward adjustment under Section 3C1.2. And the
11 "reasonable foreseeability" issue, that comes out of the
12 relevant conduct rules in the guidelines. So the bottom line
13 is that he is accountable for that conduct.

14 Now, as to whether there should be a one-level upward
15 adjustment based on the \$15,000 loss, this is simple. The fact
16 is that the defendant stipulated to the \$15,000 total-loss
17 figure. So there is no question that the one-level upward
18 adjustment does apply here.

19 And it wasn't an agreement without consideration,
20 because the plea agreement also says that in return for
21 pleading guilty to this offense, the government -- the
22 defendant would not be prosecuted for, among other things, this
23 second bank robbery, the Mount Vernon bank robbery. The point
24 is, this was an agreement that was entered into with good
25 counsel on both sides, and there is absolutely no reason to

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1 ignore the agreement that they made as part of the "plea
2 bargaining" process.

3 Now, having said that, in deciding what sentence to
4 actually impose in this case, I am not going to give any
5 consideration to the government's assertion that McCrimon
6 participated in the Hudson Valley bank robbery, in Mount
7 Vernon, on March 13th, 2013. The only thing that I am
8 sentencing the defendant for, in terms of deciding what
9 sentence is sufficient, but not greater than necessary, to
10 comply with the sentencing purposes of Section 3553(a), is the
11 Ardsley bank robbery of Wells Fargo Bank, which is the only
12 bank robbery charged in Count Two, and is the only bank robbery
13 to which he's pleaded guilty.

14 All right. Are there any other factual or legal
15 issues relating to the calculation of the guidelines that I
16 need to resolve before I finally put on the record my
17 calculation of the guideline range?

18 MR. McMAHON: Not from the government, your Honor.

19 MR. RUBIN: No, your Honor.

20 THE COURT: All right. Based on the parties'
21 agreement on certain aspects of the guidelines, not all of
22 them, obviously -- but they did agree to some extent on what
23 the guidelines -- the applicable guidelines range is. So based
24 on that agreement, based on my review of the presentence
25 report, and, more importantly, based on my own evaluation of

1 the sentencing guidelines, I adopt the guidelines calculation
2 in the PSR, and conclude that the final offense level is 25,
3 Criminal History Category II, which yields a sentencing range
4 of 63 to 78 months' imprisonment.

5 There has been no motion for any guidelines-based
6 departure from the applicable range.

7 Does the government wish to be heard on sentencing?

8 MR. McMAHON: Your Honor, as your Honor has already
9 noted, I submitted a sentencing letter on April 14th, 2014. I
10 know the Court has read it, and I will rest on that. Unless
11 the Court has any questions or any issues that it wants me to
12 address, I'll just rest on my letter.

13 THE COURT: Well, I appreciate that you're resting on
14 it, but I have to say, as I said earlier, I don't think it
15 matters, and I've made a finding that it doesn't matter, what
16 Mr. Sherrod says Mr. McCrimon did. But it is unusual in my
17 experience -- and to this extent, I certainly agree with
18 Mr. Rubin -- to have the government, at least to some extent,
19 argue in favor of someone's -- some co-conspirator's
20 credibility based on changing his story. That's unusual.

21 MR. McMAHON: Well, under the circumstances here --
22 and I won't take a lot of time on it, your Honor, but I think
23 it actually is indicative of the fact that the final statement
24 that Sherrod made was truthful and he was being candid at the
25 end, simply because the statement he made was against his penal

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1 interest. And the fact that he moved back the time when he
2 learned that McCrimon planned to rob the bank that day -- and
3 he moved it back four times -- shows that he slowly and
4 grudgingly came to that final admission.

5 THE COURT: But it was more of a, you know, indictment
6 of McCrimon than it was an admission of his own, wasn't it?

7 MR. McMAHON: No, it was -- no.

8 THE COURT: Wasn't it mainly exaggerating or mainly --
9 not exaggerating, but mainly talking about McCrimon's
10 involvement?

11 MR. McMAHON: No. No, your Honor.

12 It was Sherrod saying -- Sherrod initially said, "I
13 didn't know McCrimon planned to rob a bank that day until he
14 came back to the car with cash in his hands, and then I
15 realized he robbed the bank." Then as he was being questioned
16 by the agent, he slowly walked it back, until finally, in the
17 fourth version, he said, "All right. I knew before we left New
18 York City that day that he and I together were going to rob a
19 bank." And that makes him far more culpable, obviously. In
20 the first version, he's not culpable.

21 THE COURT: Right. But what does that have to do with
22 the things that McCrimon supposedly said in the car while they
23 were being chased by the police?

24 MR. McMAHON: It just -- it shows that Sherrod
25 ultimately was being truthful in his postarrest statement,

1 because he came to understand that perhaps it was in his best
2 interest to be truthful.

3 And the statements he understood also were against his
4 penal interest, which is, you know, one indicia of reliability,
5 for example, under the Federal Rules of Evidence, and I think
6 it's an accurate indicia of reliability. So that was my point.

7 THE COURT: Yes, I understand that point. But the
8 problem is that there's all sorts of arguments that could be
9 made the other way, which is that, yes, he eventually pointed
10 the finger at himself, but he also pointed the finger, in a
11 very accusatory way, at his co-defendant.

12 You know, he was arrested immediately after this
13 incident. Correct?

14 MR. McMAHON: Yes.

15 THE COURT: So that the thing that had just happened
16 was that there was this death-defying chase through the streets
17 of Ardsley and Hastings, which I think, in Mr. Sherrod's mind,
18 since he was the driver of the car, was the more -- was the
19 thing that was mostly on his mind. I mean, okay. He had
20 committed a bank robbery. But the main thing that he had done,
21 in terms of causing possible mayhem -- and actually, it's kind
22 of amazing that nobody got hurt in all this.

23 I remember a case that I worked on years ago, a bank
24 robbery case, flight from police, and somebody was killed in
25 the course of that flight from the police. And that, I would

1 think, would be a more typical outcome than what happened here.

2 But my point is, he had just gone through this
3 death-defying experience. So what was on his mind was the
4 dangerousness and the outrageousness of that behavior, probably
5 more so than the rather, you know, neutral event of just going
6 in and robbing a bank of \$10,000, at least in his own mind. So
7 what he was really trying -- he wasn't really focusing so much
8 on the bank robbery. He was mainly focusing on trying to shift
9 responsibility for the offense of -- at least minimize his own
10 responsibility for the car chase. That was playing a large
11 role in what he was saying to the police.

12 Look. Here's the thing. I don't think it matters. I
13 don't think it matters what McCrimon said or did not say in the
14 car. If he didn't say one word, he's still responsible for
15 that upward adjustment based on the flight.

16 MR. McMAHON: All right. And that was my first
17 argument in my letter. But then this argument was a secondary
18 argument. And he was corroborated, also, by the fact that
19 Sherrod stopped and then took off.

20 When you consider all those factors together, I think
21 it shows that Sherrod actually was being truthful at the end of
22 the day.

23 THE COURT: Well, I'm not going to make a finding one
24 way or the other about that. What I'm making my finding about
25 is that Mr. McCrimon is responsible for that flight -- for that

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1 reckless endangerment during flight. He is responsible for
2 that.

3 Okay. Anything else that you'd like to say?

4 MR. McMAHON: Nothing, your Honor.

5 Thank you.

6 THE COURT: All right. Mr. Rubin, do you wish to be
7 heard on sentencing?

8 MR. RUBIN: Judge, you indicated that you are not
9 considering the Mount Vernon bank robbery.

10 THE COURT: I'm not. As far as I'm concerned, that's
11 a nonevent.

12 MR. RUBIN: All right. Because my concern was that
13 even though in the letter of yesterday -- that's all the letter
14 was about.

15 THE COURT: I just told you I'm not considering it.
16 I'm going to sentence Mr. McCrimon for a pretty serious crime
17 that he's been convicted of, which is the Ardsley bank robbery.

18 MR. RUBIN: Solely.

19 THE COURT: Period.

20 MR. RUBIN: The Court has found the guidelines -- the
21 guideline calculation in the presentence report to be the
22 appropriate guideline level. But I would ask the Court to
23 consider a nonguideline sentence in this case.

24 Mr. McCrimon suffers from -- without going into
25 detail, it's in the record and it's in my presentence

1 memorandum. But there are definitely cognitive issues, as well
2 as the fact that he was drunk at the time of this particular
3 incident. Although the government seems to want to give
4 Sherrod some type of great credibility, I think the Court
5 pointed out that it's not -- I don't think it's consistent with
6 what they would be arguing if I was standing here next to
7 Sherrod.

8 THE COURT: It's a mixed bag. You know, some of it
9 may be true. And he does point the finger more at himself as
10 time goes on, but he also points the finger more at McCrimon.

11 MR. RUBIN: At all times --

12 THE COURT: Nobody, nobody, not just people who've
13 just committed serious crimes, but I mean, nobody is all
14 truthful or all untruthful. It's almost always a mix.
15 Hopefully, those of us who are ethical and decent people try
16 to get, you know, the highest possible degree of truthfulness.
17 But you know, human beings are funny in that way. They're not
18 all one way or all the other way. So I think there is a
19 complicated balance.

20 MR. RUBIN: And there are certain things he couldn't
21 deny, such as he was driving car, such as there was a bank
22 robbery. We stopped at the fourth version. If there was a
23 fifth version, it may have been, "I told him to go into the
24 bank." So we don't know where it would have ended. We don't
25 know how much is truthful and how much isn't.

1 But we can make a determination as to what is more
2 probable than not, based upon the facts that we do know. And
3 what we do know is that my client is extremely handicapped, in
4 the sense of certain intellectual capabilities. And it would
5 be very hard to believe that my client had directed the show
6 here. And particularly, Sherrod has got a couple of felony
7 convictions for drug dealing, certain other things. That would
8 indicate that he had some degree of street smarts.

9 THE COURT: Although I remember from Mr. Sherrod's
10 case -- I don't remember all the details -- that he also had a
11 legitimate job, it seemed to me. I mean, the whole thing about
12 that was kind of strange. Here's a guy with a real job;
13 actually, full-time employment --

14 MR. RUBIN: It may be --

15 THE COURT: -- and then engaged in this behavior. I
16 mean, it's mixed. It's mixed.

17 MR. RUBIN: I'm talking about his cognitive ability.

18 THE COURT: Oh, okay. In a relative sense, he had a
19 greater intellectual capacity than did Mr. McCrimon.

20 MR. RUBIN: And to make it sound like somehow this
21 entire incident between the bank robbery and the escape or the
22 flight from the bank robbery was somehow all my client's doing,
23 even though he moderated a little bit as the -- I don't think
24 the FBI expressed skepticism, because the story kept on
25 changing.

1 You've got the letters from the various people who
2 know my client. He certainly engaged in this robbery. As a
3 matter of fact, his story immediately, when he was caught, was,
4 "I did it." He never tried to say that he didn't do it. He
5 never tried to make up other stories. He admitted his
6 culpability immediately upon being caught. I don't know even
7 if he was questioned. I think he just perhaps blurted it out
8 to the police.

9 However, I think the Court should take into
10 consideration -- while the Court has found that the guidelines
11 do apply -- that the enhancements to the guideline calculations
12 do apply to my client for possessing what it would appear to be
13 a dangerous device, as well as the reckless endangerment caused
14 by the flight, I think that the Court should take into
15 consideration that, in fact, there was no weapon.

16 Now, while the guideline calculation, I understand, is
17 as the Court has determined, he, in fact, had no weapon. And
18 if anybody was likely to be injured should a bank guard or
19 police officer, you know, draw a gun thinking that he had a
20 weapon, it was likely to be him. I think it's something the
21 Court can and perhaps should consider in determining whether or
22 not a nonguideline sentence is appropriate, the fact that he
23 was not armed.

24 Secondly, I think that the fact is that my client did
25 not have control of the vehicle. Now, while it might be

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1 reasonable for a reasonable person to expect that his
2 co-conspirator is going to engage in reckless conduct -- and
3 the Court has just found it, and I'm not sure I agree a hundred
4 percent, but flight is flight -- my client wasn't operating the
5 vehicle. Sherrod was.

6 THE COURT: What you're saying -- without conceding
7 the point, I think what you're saying is that even if he is
8 accountable for the guidelines --

9 MR. RUBIN: Right.

10 THE COURT: -- adjustment, still, as a matter of
11 common sense and fairness, he's not as --

12 MR. RUBIN: Culpable.

13 THE COURT: -- culpable as Sherrod, because he wasn't
14 driving the car.

15 MR. RUBIN: Correct.

16 And I think the fact that Sherrod might have stopped
17 for a second and then sped up is no indication that my client
18 told him to do that. People, when they -- I mean, I don't know
19 how many times I've seen cases --

20 THE COURT: I'm not finding in any way, shape or form
21 that Mr. McCrimon told him to do that or told him to go or told
22 him to stop or told him to speed. That has no place in this
23 sentencing at all.

24 MR. RUBIN: Beyond that, I might have written in my
25 letter, the government --

1 THE COURT: Might have written? Don't you know what
2 you wrote?

3 MR. RUBIN: I don't recall if I wrote this or not.
4 And if I look at it carefully, I might find it. But what I
5 want to point out -- and I may have pointed it out already --
6 is that the government's response to Sherrod's presentence memo
7 argues that Mr. McCrimon -- the reason why Sherrod should be
8 held accountable for the "reckless endangerment" enhancement is
9 because, among other people, Mr. McCrimon was endangered by
10 Sherrod's driving, and which I'm arguing here, as well, you
11 know.

12 So in terms of relative culpability for that behavior,
13 I'm arguing that my client did not want Sherrod to cause him to
14 become injured, did not want him to drive like a maniac through
15 the streets, and was not -- was not urging him to do so.

16 In the theoretical sense, was it reasonably
17 foreseeable? The Court has already found that it is. But I
18 think that that should also be taken into consideration by your
19 Honor when determining whether or not my client is a person who
20 is perhaps worthy of a less-than-guideline sentence.

21 The Court has sealed the documents, with my approval,
22 and I'm glad you've done so. But the documents and everything
23 that's been provided to the Court would indicate that he is of
24 limited intellectual ability, that he is also a very loving
25 individual to those people close to him, including children.

1 His sister is here in court today, as is his -- well, the
2 person he lives with, who is the mother of his child, Rasheeda
3 Barzey. And they've both written letters. Of course, you've
4 read their letters. All the letters, all the letters that the
5 Court has received, all kind of describe my client the same
6 way. Besides the cognitive difficulties that he has, he also
7 has certain psychological problems for which he's receiving
8 medication, which, by the way, in my assessment, has been doing
9 a great deal of good for him, because over the course of time,
10 I find he has become somewhat more communicative with me,
11 including today when I spoke to him earlier today.

12 Obviously, he's anxious to get back to his family, to
13 the child that he adores and has been -- by all reports, cares
14 for the child well. And you know, I recognize that -- you
15 know, I'm not standing here asking for a "time served"
16 sentence, but I think that a sentence -- he recognizes the --

17 Well, I think all of the requirements of 3553 can be
18 met with a sentence that's less than the guideline level, which
19 is in excess of five years. That would be sufficient, but not
20 greater than necessary, to take into account all the
21 requirements of the statute.

22 He doesn't want to be in this situation again. He has
23 had a miserable time in jail for a number of reasons, one of
24 which is, he's aware of his limitations. And it's something
25 that, to a great extent, embarrasses him. And he has not been

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1 using that as an excuse, even in jail. He doesn't want to try
2 to use those things as an excuse to get better housing, for
3 example, in the jail. So it's a difficult time for him.

4 You know, I know you know all the arguments. You've
5 been in this situation where I am before.

6 I think that there can be a sentence fashioned that
7 would include some period of incarceration, followed by,
8 hopefully, some structured and significant period of therapy,
9 whether inpatient or outpatient, something to be determined by
10 the professionals, but something that could help him, both
11 emotionally and -- well, help him psychologically, I expect,
12 get on with his life, because he will get out of jail at some
13 point in the future. And we would want him to get out of jail
14 a better person than the way he went in. And unfortunately, my
15 experience with the Bureau of Prisons is that he's not going to
16 get a great deal of therapy while he's in prison.

17 In fact, I recently had a case with Judge McMahon
18 where I had a client who was sentenced for a -- on a "child
19 pornography" case. And Judge McMahon gave a sentence, and made
20 a strong, strong recommendation that he be sent to a facility
21 where he would receive the appropriate counseling therapy,
22 whatever you want to call it, for the offense that he had
23 committed. Not only wasn't he sent to a facility, he never
24 received any counseling in the entire -- he had a four-year
25 sentence, you know, served whatever period of time with the

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1 good time. But he never received a minute of therapy or
2 counseling.

3 So I'm not -- you know, I am not terribly confident
4 that the Bureau of Prisons is going to address any type of
5 either emotional or psychological rehabilitation or therapy
6 that he would require. And that's why I'm asking -- you know,
7 I understand punishment has to be part of this. But I don't
8 think that 5 years is necessarily the amount, or 63 months, or
9 63 to 71 months is necessarily the amount of punishment that
10 would be sufficient, but not more than necessary, to do this.
11 I think that some period of punishment, obviously, is called
12 for, but I think, more importantly, there should be a period
13 when -- there should be some type of significant "supervised
14 release" structure to enable him to get out a better person.
15 Because, God willing, he's going to get out. And if he just
16 does the five years with nothing and he gets out, you know, is
17 he going to be a better person for it? I doubt it.

18 And that's all I have to say, Judge. I believe he is
19 a good candidate for a less-than-guideline sentence, for the
20 reasons that I've said and reasons that you're aware of from
21 the submission.

22 THE COURT: Okay. Thank you, Mr. Rubin.

23 Mr. McCrimon, is there anything that you would like to
24 say, or is there any information that you would like to present
25 before I impose sentence?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: Okay. Why don't you sit down. That way,
3 you can be heard better through the microphone. Pull that
4 microphone up towards you.

5 Go ahead, Mr. McCrimon.

6 MR. RUBIN: May I just ask him briefly what he --

7 THE COURT: Of course, you can talk to him. Take your
8 time.

9 (Conference between defendant and attorney)

10 THE COURT: Go ahead, Mr. McCrimon.

11 THE DEFENDANT: Sir, I just want to say that I know
12 what I did was wrong, and I'm sorry to the people in the bank
13 that I scared. I didn't mean to hurt anybody. And, you know,
14 I'm sorry to my family, and I didn't mean to hurt them. I ask
15 that everybody please forgive me. And I got one son, and he's
16 18, and I want to help him so he won't be in a situation like
17 me. I ask that I be given a chance. I'm sorry.

18 THE COURT: Anything else, Mr. McCrimon, or is that
19 it?

20 THE DEFENDANT: That's it.

21 THE COURT: Okay. Thank you very much.

22 All right. Well, let me say first that in deciding
23 the appropriate sentence in this case, I have considered all of
24 the statutory factors set forth in Section 3553(a) of Title 18.
25 And for reasons that I'll spell out in a moment, I do not think

1 a nonguideline sentence in this case is appropriate. I believe
2 a sentence of 63 months' imprisonment, to be followed by three
3 years of supervised release, is sufficient, but not greater
4 than necessary, to comply with the purposes of sentencing set
5 forth in the statute.

6 I am perfectly willing, in the appropriate case -- in
7 fact, in most cases, I would say -- to impose a sentence that
8 varies from the guidelines, if there is a good reason to do so.
9 The "if," of course, is the big question. I'm not going to do
10 it just as a matter of routine. I would do it, and I have done
11 it many times, if I thought that there was a good reason to do
12 so.

13 But what we have here is a bank robbery in broad
14 daylight in our community, where Mr. McCrimon, even if he is of
15 limited intellectual capacity, was wearing a bag of some kind
16 around his neck, presented a note to the teller which was
17 clearly threatening. It didn't say "I'm going to shoot you
18 immediately if you don't give me the money," but the gist of
19 the note was, "Something really bad is going to happen if you
20 don't give me \$20,000 quickly." And that's where we start and
21 almost end in this case, because that's a serious crime.

22 And I just don't see how I can impose a sentence less
23 than 63 months, which is the bottom of the guideline range, for
24 a crime as serious as this. It doesn't matter that it wasn't a
25 real explosive device. It doesn't matter whose idea it was.

1 Maybe it was Mr. Sherrod's idea to rob this bank. I don't
2 know. But to me, it doesn't matter. What matters is that
3 Mr. McCrimon knew what he was doing when he went into that bank
4 with a prop and with a note. And as I said earlier, the risk
5 in that circumstance is real, even if the device is not real;
6 in other words, even if there is no weapon. That's a good
7 thing. I guess it would be worse -- it would be worse if it
8 was a real weapon. In fact, it would be an "armed bank
9 robbery" charge. This is not an "armed bank robbery" charge.
10 Right? This is just a straight bank robbery.

11 Am I right about that?

12 MR. McMAHON: Yes, your Honor.

13 THE COURT: It doesn't require -- there is no element
14 of the use of a weapon to rob the bank.

15 MR. McMAHON: No.

16 THE COURT: So armed bank robbery is, by definition,
17 more serious than bank robbery. In this case, he was not
18 armed, but what he did did create a real risk of harm to other
19 people in the bank, because there easily could have been a
20 violent reaction by police or bystanders or someone in the
21 bank. And really terrible things can happen when there is a
22 violent reaction to someone who is threatening the use of a
23 destructive device.

24 In addition, as we said before, fleeing from police is
25 part and parcel of robbing a bank. I mean, it's in the public

1 imagination that there is always a get-away driver from a bank
2 robbery. And you always hop in and speed off and try to avoid
3 arrest and capture. And that also creates great danger to
4 bystanders, pedestrians, other drivers, the other person in the
5 car, even the police. It puts everybody in ~~extreme~~ risk of
6 serious injury.

7 Now, I do agree with Mr. Rubin that in a relative
8 sense, Sherrod, who was driving the car, is more culpable in
9 that respect than Mr. McCrimon. But either way, Mr. McCrimon
10 was involved in activity in furtherance of the underlying crime
11 that was reasonably foreseeable to him, which put others at
12 ~~extreme~~ risk of serious injury.

13 And I'll stop here to note that I believe the sentence
14 for Mr. Sherrod was 77 months. So that sentence took into
15 account the fact that Mr. Sherrod was driving the car. My
16 recollection is that in that case, Mr. Sherrod was making an
17 argument, "Well, I shouldn't be held accountable for the note
18 and for the -- you know, for creating the impression that
19 McCrimon had an explosive device." And on that one, I think
20 you could argue perhaps that Sherrod is less culpable than
21 McCrimon, because McCrimon was the one who was carrying the
22 note and carrying the bag. But in terms of the get-away,
23 which, arguably, is the worst part of this, even though,
24 technically, he's not -- neither of these defendants is being
25 charged with or convicted of reckless driving, you can make a

1 pretty strong argument that in the entire episode, the worst
2 part of whole thing was the driving part.

3 But that doesn't make it -- I don't want to suggest
4 that bank robbery is not a serious crime. It is a serious
5 crime. And I'm just saying that all these things go into
6 consideration here. One is the seriousness of the offense, two
7 is the use of the note and the bag to create the impression
8 that he had a destructive device, and three is the fact that he
9 should be held accountable for the reckless flight that
10 occurred thereafter.

11 Mr. McCrimon may well -- in fact, I accept at face
12 value that he is a person of limited intellectual capacity.
13 But at the time of the offense, he was a 38-year-old man who
14 certainly knew what he was doing and that what he was doing was
15 wrong.

16 Let's assume, for purposes of this sentencing, that he
17 was not the mastermind; that because of the relative
18 intellectual capacity between Sherrod and McCrimon, it was
19 really Sherrod who was the driving force here, and not
20 McCrimon, and that Sherrod was, in effect, exaggerating
21 McCrimon's role. But again, I really don't think it matters
22 whose idea it was or who planned it or who orchestrated the car
23 chase. There is no question that Mr. McCrimon was a central
24 player in this robbery. He carried the bag, he carried the
25 note, and he needs to be held appropriately accountable for

1 that behavior.

2 The question is: What does that mean? What is an
3 appropriate sentence? And on that point, my view is that if it
4 weren't for the fact that Mr. McCrimon has a number of
5 mitigating factors in his life, such as the fact that he had a
6 terrible upbringing, that he comes from a broken home, that he
7 never even met his father --

8 His father didn't abandon him, in the sense of being
9 there for a while and leaving. From what I can tell, he never
10 even met his father once in his entire life.

11 -- that he was shuttled between foster homes, that he
12 may well have been the victim of physical abuse or worse, that
13 he has the intellectual ability of -- you know, at the bottom
14 of the chart, so to speak, in terms of IQ, all of that suggests
15 that he has been dealt a rather unfortunate hand in life. So I
16 am taking that into consideration, and I think that does
17 mitigate the sentence in this case.

18 It's also clear, from the letters that I received from
19 some of the folks here in the courtroom, that Mr. McCrimon is a
20 kind person, a caring person to his family and friends. So
21 what I will say is that if it were not for this history, his
22 personal history and his personal characteristics, I would
23 impose a sentence closer to the top of the sentencing guideline
24 range and maybe equal to -- after all, both of these guys were
25 involved in this robbery together -- maybe equal to the

1 sentence that I imposed for Sherrod. And the sentence in that
2 case, as I say, was 77 months.

3 But because of Mr. McCrimon's limited intellectual
4 abilities and his long-standing unaddressed mental health
5 issues and the fact that he was dealt this terrible hand, in
6 light of the fact that he, you know, had this terrible
7 upbringing, and also the fact that others believe him to be a
8 kind and decent and caring person, because of all those things,
9 I believe a sentence at the low end of the sentencing range is
10 sufficient, but not greater than necessary, to satisfy the
11 sentencing objectives as set forth in the statute.

12 So I guess the point is that if it weren't for those
13 things, if it weren't for those mitigating factors, justice
14 would require that I sentence Mr. McCrimon to a sentence
15 roughly the same as the sentence I imposed on Mr. Sherrod. But
16 I'm not going to do that. I'm going to sentence him to a jail
17 sentence which is almost a year and a half less -- or more than
18 a year less severe than the sentence I imposed on Mr. Sherrod
19 for the reasons I just said.

20 But I do think that a sentence at the bottom of the
21 guidelines promotes the sentencing objectives of just
22 punishment, respect for the law, protection of the community
23 and general and specific deterrence. But most importantly, the
24 most important factor is that it satisfies the need for a
25 sentence -- it satisfies the need for the sentence imposed to

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1 reflect the seriousness of this offense. And it's so serious
2 that I just don't believe that the mitigating factors that
3 Mr. Rubin has talked about and the presentence report talks
4 about and that Dr. Goldstein talks about --

5 Is that right? Dr. Goldstein? Did I get that right?
6 Yes.

7 -- Dr. Goldstein talks about, I just don't think
8 they're enough to offset the seriousness of the offense, enough
9 such that I could impose a sentence below the guidelines.

10 As I said earlier, the record should be clear that I'm
11 not giving any consideration to the government's assertion that
12 McCrimon did, indeed, participate in the Mount Vernon bank
13 robbery. And I'll also say for the record, or I'll also say
14 that even if I did not add the one level based on the \$15,000
15 loss, I would still sentence Mr. McCrimon to 63 months. If the
16 guideline range was at Level 24, rather than 25, the sentencing
17 range would be 57 to 71 months, which overlaps with the
18 applicable range in this case, which is 63 to 78 months. So 63
19 months is in both ranges. It's at the bottom of the range that
20 I find is applicable, and it's roughly in the middle of the
21 range that would apply if the loss was \$10,000, rather than
22 \$15,000. Either way, it's a sentence that I believe is
23 appropriate and sufficient, but not greater than necessary, to
24 satisfy the objectives of the statute.

25 Does either counsel know of any legal reason why the

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1 sentence should not be imposed as stated?

2 MR. McMAHON: No, your Honor.

3 THE COURT: Mr. Rubin?

4 MR. RUBIN: No legal reason, your Honor.

5 THE COURT: Mr. McCrimon, can you please stand.

6 It is the judgment of the Court that you be committed
7 to the custody of the Bureau of Prisons for 63 months, to be
8 followed by three years of supervised release.

9 The standard conditions of supervised release 1 to 13
10 shall apply.

11 The following mandatory conditions shall also apply.
12 They're on Page 23 of the presentence report. Here they are.

13 The defendant shall not commit another federal, state
14 or local crime.

15 The defendant shall not illegally possess a controlled
16 substance.

17 The defendant shall not possess a firearm or
18 destructive device.

19 The mandatory drug testing condition is suspended due
20 to the imposition of a special condition requiring drug
21 treatment and testing.

22 And finally, the defendant shall cooperate in the
23 collection of DNA, as directed by the Probation Officer.

24 Now, the standard -- I'm sorry.

25 The following additional --

1 Strike that.

2 The following special conditions shall also apply.

3 They're set forth on Pages 23 and 24 of the presentence report.

4 I'm imposing all of them, except Number 6, which I'll explain
5 in a minute.

6 1. The defendant shall provide the Probation Officer
7 with access to any requested financial information, because I'm
8 also going to impose restitution in this case.

9 2. The defendant shall not incur new credit charges
10 or open additional lines of credit without the approval of the
11 Probation Officer, unless the defendant is in compliance with
12 the installment payment schedule which I will set in a minute.

13 3. The defendant will participate in a program
14 approved by the U.S. Probation Office, which program may
15 include testing to determine whether the defendant has reverted
16 to using drugs or alcohol. The Court authorizes the release of
17 available drug treatment evaluations and reports to the
18 substance-abuse-treatment provider, as approved by the
19 Probation Officer. The defendant will be required to
20 contribute to the cost of services rendered -- in other words,
21 a co-payment -- in an amount determined by the Probation
22 Officer, based on his ability to pay or the availability of
23 third-party payment.

24 4. The defendant shall participate in an alcohol
25 after-care program under a co-payment plan, which may include

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1 testing via Breathalyzer, at the direction and discretion of
2 the Probation Officer.

3 5. The defendant shall participate in a mental health
4 program approved by the U.S. Probation Office. Defendant shall
5 continue to take any prescribed medications unless otherwise
6 instructed by the healthcare provider. The defendant shall
7 contribute to the cost of services rendered not covered by
8 third-party payment, if the defendant has the ability to pay.
9 And the Court authorizes the release of available psychological
10 and psychiatric evaluations and reports to the healthcare
11 provider.

12 I'm not imposing the search condition, which is
13 Number 6 in the PSR. I don't see any basis for imposing that
14 condition, because this case doesn't involve the concealment of
15 drugs or weapons or other contraband. In fact, there were
16 no -- there was no contraband. There were no weapons.
17 Certainly, there were no drugs. So I'm not imposing the search
18 condition.

19 The defendant is to report to the nearest Probation
20 Office within 72 hours of his release from custody. And it is
21 recommended that the defendant be supervised by his district of
22 residence.

23 I'm not imposing a fine, because I find the defendant
24 does not have the ability to pay a fine.

25 I am imposing restitution in the amount of \$10,880.20.

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1 And in the PSR and in the previous judgment, I ordered that be
2 payable to EAN Holdings, LLC, 6929 North Lakewood Avenue, Suite
3 100, Tulsa, Oklahoma 74117. That's joint and several liability
4 with the co-defendant; James Sherrod.

5 I think there was a slightly different name or
6 address.

7 MR. McMAHON: There was. EAN Holdings or Enterprise
8 are the same thing. It's the same company.

9 THE COURT: So that's acceptable the way it is stated?

10 MR. McMAHON: Yes.

11 THE COURT: Okay. I just wanted to make it consistent
12 with what I did -- I looked at the other judgment, and that's
13 what I did in the other judgment. Since they're both
14 responsible for the same thing, the payments should be made to
15 the same place. Okay.

16 Restitution is payable in monthly installments of ten
17 percent of Mr. McCrimon's gross monthly income over the period
18 of supervision, to commence 30 days after his release from
19 custody. In addition to that, if the defendant is engaged in a
20 BOP non-UNICOR work program, the defendant shall pay \$25 per
21 quarter toward the criminal financial penalties, including
22 restitution. However, if the defendant participates in the
23 BOP's UNICOR program as a Grade 1 through 4, the defendant
24 shall pay 50 percent of his monthly UNICOR earnings toward the
25 criminal financial penalties, consistent with BOP regulations

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1 at 28 CFR Section 545.11.

2 In addition, there is a mandatory special assessment
3 of \$100. I have no discretion in that matter, so I am imposing
4 that, and that is due immediately.

5 The foregoing constitutes the sentence of the Court.

6 You can have a seat, Mr. McCrimon.

7 Mr. McCrimon, you have the right to appeal your
8 sentence, subject to any limitations on that right contained in
9 your plea agreement with the government. If you are unable to
10 pay the cost of an appeal, you may apply for leave to appeal
11 without payment of costs. Now, this is important. If you do
12 decide to appeal, you have to file a notice of appeal within 14
13 days after the entry of judgment. Therefore, if you do wish to
14 appeal, you must advise your attorney to prepare and file a
15 notice of appeal immediately. Or if you request, the Clerk
16 will immediately prepare and file a notice of appeal on your
17 behalf.

18 Okay. There is an open count, right, Count One?

19 MR. McMAHON: Yes.

20 I move to dismiss Count One.

21 THE COURT: Any objection?

22 MR. RUBIN: No, Judge.

23 THE COURT: All right. Count One is dismissed.

24 Recommendations to the Bureau of Prisons?

25 I noticed that in Dr. Goldstein's report that he

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1 recommended that, upon -- let me just find it -- upon his
2 admission to a federal correctional facility that Mr. McCrimon
3 undergo some psychiatric evaluation.

4 Would you like me to put that as a recommendation in
5 the judgment? I don't have to. I won't if you don't want me
6 to.

7 MR. RUBIN: Can I just have a moment on that?

8 THE COURT: Sure.

9 (Conference between defendant and attorney)

10 MR. RUBIN: Yes, Judge. I think that's a good idea.

11 THE COURT: Well, I will recommend it. But my
12 experience with BOP is not that different than yours,
13 Mr. Rubin. But I will certainly recommend in writing, in the
14 judgment, that upon admission, Mr. McCrimon be evaluated
15 psychiatrically. Period.

16 MR. RUBIN: May I ask for one other thing, your Honor?

17 THE COURT: Sure.

18 MR. RUBIN: Well, actually, two other things.

19 One, that the Court recommend that he be -- to the
20 extent that the Bureau of Prisons will pay attention to the
21 recommendation, that my client be sent to a facility close to
22 the New York Metropolitan Area or in the New York Metropolitan
23 Area, where he can have visits from his family, which I think
24 are important to him, you know, for a number of reasons.

25 THE COURT: Yes. But it's better if I give a specific

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1 city. I'm not sure. Where was he living before this?

2 MR. RUBIN: He was living in Brooklyn, I believe.

3 THE COURT: Brooklyn?

4 MR. RUBIN: He was living in Brooklyn. I'm not sure
5 if MDC is necessarily the best place.

6 THE COURT: No, MDC is really for very short sentences
7 or awaiting transfer. I'll just say -- recommend in the
8 judgment that he be designated to a facility as close as
9 possible to Brooklyn, New York.

10 MR. RUBIN: Okay. That would be good, Judge.

11 THE COURT: Is that sufficient?

12 MR. RUBIN: I believe it is.

13 And, Judge, between now and when the judgment is
14 prepared -- and I know you're very efficient -- if I could
15 come -- if there is a facility that I could recommend to the
16 Court, could I ask that the Court include that in the judgment?

17 THE COURT: Of course. But I do like to do these
18 things -- and I have certain rule in my chambers that I try to
19 get these things out quickly.

20 By the way, the court has now -- meaning the Southern
21 District Board of Judges has recently passed a new resolution,
22 which I don't think is particularly binding, frankly, but in
23 any event, it strongly encourages all judges to enter the
24 judgment after -- within seven days of sentencing.

25 MR. RUBIN: Well, I will do it within a day or two,

1 Judge.

2 THE COURT: The point is, I'll wait up to a week. If
3 I don't hear from you by a week from today, I'll go ahead and
4 enter the judgment.

5 MR. RUBIN: Thank you, Judge.

6 THE COURT: But I won't do it at least until the 21st.

7 MR. RUBIN: Judge, the only other request I have is,
8 would the Court consider ordering the 500-hour program? It was
9 clear that he was under the influence of alcohol at the time of
10 this event.

11 THE COURT: Yes, I'll order it again.

12 A very large majority of all defendants are all
13 sentenced -- defendants going to prison have drug problems, but
14 there is a reference to it in his presentence report, and
15 that's what they look at to determine if he's eligible. So I
16 will recommend -- I can't order. I can recommend that the BOP
17 enroll Mr. McCrimon in the 500-hour residential drug use
18 program. So I will do that.

19 MR. RUBIN: Thank you, Judge.

20 THE COURT: Okay. Anything else that we need to take
21 care of today?

22 MR. McMAHON: No, your Honor.

23 THE COURT: And, Mr. Rubin, anything else?

24 (Conference between defendant and attorney)

25 THE COURT: Anything else Mr. Rubin?

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1 MR. RUBIN: No, your Honor.

2 THE COURT: Outside of the fact that you may write me
3 a letter about a particular facility. That's fine.

4 Okay. Thank you all very much.

5 And good luck to you, Mr. McCrimon.

6 THE DEPUTY CLERK: All rise. This Court will be in
7 recess.

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